Environmental Defence Society Inc
PO Box 91736
Victoria Street West
Auckland 1142
Contact: Deidre Koolen-Bourke, deidre@eds.org.nz

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CMAP Consultation
Policy Unit
Department of Conservation
By email: CMAP@doc.govt.nz

SUBMISSION ON PROPOSALS TO AMEND CONSERVATION MANAGEMENT PLANNING AND CONCESSIONS LEGISLATION

Introduction

1. This is a submission from the Environmental Defence Society (EDS) on the legislative reform options set out in the Department of Conservation's (DOC) *Conservation Management and Processes* Discussion Document, dated May 2022 (Discussion Document).

2. EDS is an independent not-for-profit organisation conducting interdisciplinary policy research and litigation. It was established in 1971 with the objective of bringing together the disciplines of law, science and planning to promote better environmental outcomes in resource management.

3. EDS is familiar with the complex challenges facing conservation managers and decision-makers in Aotearoa New Zealand. It recently led an in-depth review of the conservation system and published findings in a report titled "Conserving Nature: Conservation Reform Issues Paper".[1] That Report identified, *inter alia*, the key issues, problems and points of tension that exist within the current conservation planning system. EDS is currently undertaking research for DOC on future options for conservation system reform. A report on that work will include recommendations for how to best improve the conservation planning system.

Overall comment on the proposed reform options

4. It is widely recognised that there is a need to urgently reform the conservation management system in Aotearoa New Zealand. EDS's *Conserving Nature* report found the

[1] Deidre Koolen-Bourke and Raewyn Peart, 2021, *Conserving nature: Conservation reform issues paper*, Environmental Defence Society, Auckland. Available from: www.eds.org.nz

system was under significant stress and many of its core components are no longer fit-for-purpose. These matters are intended to be addressed in substantive reforms to come.

5. With respect to this interim reform process, EDS submits that some of the proposals prematurely attempt to streamline decision-making in the absence of clear direction for conservation land.

6. Further, while EDS agrees that there is an urgent need to address delays in the current processes for development and review of planning documents,[2] which have resulted in a large number of planning documents being out of date and no longer fit-for-purpose,[3] EDS does not consider that the proposed reform options will address the issues.

7. The Discussion Document states that the back log of planning documents that are overdue for review or development is the result of legislative barriers or impediments, namely, the requirement to undertake full plan reviews every 10 years, difficulties updating exiting plans and prescriptive public engagement requirements.

8. In *Conserving Nature* EDS identified the key reasons for the observed delays in current planning processes as:[4]

    - Resourcing constraints, including a lack of available planning capacity/support and operational funds;

    - A failure to prioritise necessary plan reviews within the mandatory 10 year statutory timeframe;

    - Complexity in statutory processes (e.g., multiple, sometimes duplicate, consultation requirements); and

    - Stakeholder conflict during the initial plan development phase.

9. There is a significant mismatch between issues identified and proposed solutions.

10. EDS acknowledges the need to create greater efficiencies in the concessions system and to move past a 'first-come-first-served' approach. An effective tendering process is an important tool that could assist to ensure that concessions are allocated in a way that produces positive conservation outcomes. However, in the context of a statutory framework lacking clear purposes and direction, it will be important to ensure that any changes made are underpinned by robust criteria.

Chapter 1

Issue 1A: 10 year review requirement is contributing to the backlog of planning documents needing review or development

[2] Throughout this submission planning documents refers collectively to conservation management strategies (CMSs), conservation management plans (CMPs) and national park management plans (NPMPs)

[3] As identified in the review by Deidre Koolen-Bourke and Raewyn Peart *Conserving nature: Conservation reform issues paper*, (Environmental Defence Society, Auckland, 2021) at 77.

[4] Deidre Koolen-Bourke and Raewyn Peart *Conserving nature: Conservation reform issues paper*, (Environmental Defence Society, Auckland, 2021) at 77.

11. Currently, planning documents must be fully reviewed every 10 years. The Discussion Document details reasons why DOC has been unable to keep up with this requirement, citing lack of resources and costs.

12. Three options for reform are proposed:

    - Replace the current full review requirement with a new statutory check-in process (Option 1).

    - Extend the current review timeframe from 10 years to 20 years (Option 2).

    - Retain the status quo (Option 3).

13. The proposed check-in process would enable DOC to make a determination on the appropriate pathway for a plan at the 10-year milestone. Specifically, whether, after consulting with tangata whenua, the New Zealand Conservation Authority (NZCA) and relevant conservation boards, the planning document be reapproved in full, or whether a partial or full review is required.

14. While the Discussion Document hints at a statutory test for the check-in process, it does not detail any statutory or policy criteria defining that test. Likewise, although it states that it is unlikely that any planning document will meet the test of requiring no review, no detail is provided on the legal threshold for that decision.

15. EDS considers that Option 1 has merit. However, it cannot support it in its current form given the lack of clarity on the statutory tests for reapproval, partial or full review. This issue is exacerbated by the lack of definition of current conservation purposes. Thus, EDS is unclear on what basis DOC would be making its determinations.

16. EDS submits that any test should be set out in the primary legislation (not left to policy) and state, at a minimum, that a planning document cannot be reapproved if:

    a. The management context has changed substantially since the plan was approved or previously reviewed; or

    b. Monitoring records indicate that conservation objectives are not being met.

17. Both of these requirements rely on there being sufficiently robust standards and monitoring frameworks to support effective decision-making and we question whether these exist in the current management system.

18. Further, the Discussion Document does not address ongoing check-in decisions, or provide for any statutory limit to the number of reapprovals or partial reviews that can be given. Without such trigger points, planning documents could be reapproved, or only partially reviewed, on a continual basis. EDS submits that some form of limit is required to ensure that planning documents will eventually be fully reviewed. This is important because:

    a. Multiple amendments to a document via partial reviews can result in the document losing its cohesiveness and direction; and

    b. Successive reapprovals would remove public participation in planning processes for decades.

19. EDS submits that, notwithstanding any reapproval or partial review decisions, a planning document should be fully reviewed every 20 years.

20. On its own, however, EDS does not support Option 2 and a 20 year review period. There is no justification for extending the current full review timeframe from 10 years to 20 years. Doing so is likely to worsen, not improve, conservation outcomes. It will further entrench DOC's inability to respond to changing needs, new technology and evolving pressures.

21. Accordingly, EDS:

    a. Supports retention of the status quo that plans must be reviewed in full at least once every 10 years (Option 3); but

    b. Considers that Option 1 has merit subject to:

        - A robust statutory test for reapprovals and partial reviews; and

        - A requirement that plans should be fully reviewed every 20 years regardless of any reapprovals or partial reviews approved.

22. EDS would welcome the opportunity to assist DOC in developing a statutory test for its proposed check-in process.

Issue 1B: Planning documents are difficult to update

23. Existing legislation requires that when planning documents are reviewed in part, or amended in a way that materially affects objectives, policies or the public interest, the the proposed changes must go through the same statutory process that is used for a full plan review i.e., public notification, submissions, hearing. The Discussion Document states that this pathway is adding complexity, delays and costs which disincentivise partial reviews.

24. To address the issue, it is proposed that existing legislation be amended to introduce a streamlined process for partially reviewing planning documents where public interest is limited (Option 1). Under the proposed approach, partial reviews and amendments to planning documents that are of limited public interest would only be notified to persons or groups directly affected by the proposed change. Consultation with tangata whenua, relevant conservation boards and post-settlement governance entities would still be required.

25. In effect, the proposed reform would replace the existing full public notification and submissions process with a limited notification process.

26. EDS agrees that it is important to regularly update planning documents to respond to changing circumstances and new pressures and that such updates should be as efficient and cost effective as possible. However, EDS has a number of concerns with the proposed reform:

    a. Although DOC has received feedback from those involved in plan updates that the current process is inappropriate and inefficient, DOC itself does not have any accurate records of the time and resources spent on statutory planning processes. Consequently, the Discussion Document cannot detail with any degree of certainty the extent to which public notification requirements are contributing to complexity, delays

and expense, above and beyond that which would be experienced by only notifying directly affected entities.

b. Stakeholder conflict, a key issue with the current approach identified in *Conserving Nature*, is unlikely to be significantly reduced by excluding the public from plan change processes. DOC accepts that early engagement on plan changes is crucial, and it is expected that it will still take place regardless of any reduced notification. Overall, EDS does not consider that there is, in fact, a 'case for change'.

c. The proposed reform does not address the other main issues associated with planning documents identified in *Conservation Nature*. Rather, the Discussion Document discounts two options for reform that would significantly reduce the level of complexity, delay and cost associated with updating planning documents on the basis that they are out of scope; increased funding and reconfiguring the governance and management structure of the planning system.

d. Public participation in plan change processes plays an important role in ensuring that directly affected interests are subjected to appropriate checks and balances. EDS would be very concerned if interested persons or groups were able to materially change planning objectives and policies without public oversight and input.

   Further, it is widely recognised that effective public engagement in planning processes can enhance the quality of plans by strengthening policy direction and management objectives, and ensuring important public values are recognised.

e. Limited public interest is defined in the Discussion Document as where the proposed change relates to a confined issue, where consultation with tangata whenua, relevant conservation boards and PSGEs find that limited notification is appropriate, and where DOC is able to identify all persons and groups directly affected by the proposed change. There is no further definition of 'confined issue', 'appropriate' or what 'directly affected' means.

   Limited notification decisions under the Resource Management Act 1991 (RMA) are often the subject of extensive and protracted Court cases. As a result, the RMA has been amended multiple times in an attempt to address notification issues. Section 95B of the RMA now has a four-step process for determining when limited notification is required.

   DOC is likely to encounter similar challenges to those faced by RMA notification decisions. In some cases, these challenges may outweigh any perceived efficiencies gained by limited notification. The Discussion Document does not address these litigation risks.

f. It is unclear how limited notification to those persons and groups deemed directly affected would be undertaken. The Discussion Document states that DOC would be required to 'engage' with these entities during the drafting of the proposed change(s) and then provide the proposal to the conservation board(s) for approval. This suggests that formal limited notification is not intended. EDS submits that an informal engagement process is inappropriate and that persons and groups directly affected by proposed changes to planning documents should be formally notified on a limited basis, thereby securing their rights of submission, hearing and appeal.

g. The Discussion Document acknowledges that the reform option may lead to planning documents being less successful in reflecting community aspirations. It states that this will be tempered somewhat by public consultation on full reviews and partial reviews

that are of public interest. When combined with the proposed check-in reform option discussed above, EDS submits that the reform option could significantly curtail public participation in conservation management planning over long periods of time.

27. Accordingly, EDS supports retention of the status quo, requiring public notification of plan reviews or amendments as currently specified in existing legislation (Option 2).

28. If Option 1 was adopted, EDS submits that the test for determining 'limited public interest' and its associated terms ('confined', 'appropriate', 'directed affected') must be statutory defined. Directly affected persons and groups should also be formally notified on a limited basis, rather than informally engaged.

Issue 1C: Public engagement processes are outdated and inflexible

29. The Discussion Document sets out a number of specific inefficiencies associated with current legislative requirements for public notification and submissions.

Issue 1C(i): Public notification of intent to develop or review a NPMP

30. The National Parks Act 1980 currently provides a formal opportunity for public input in developing or reviewing a draft NPMP. As public notification of a draft NPMP is also required, the former requirement is unnecessarily duplicatory.

31. The Discussion Document sets out a proposal to remove the requirement to publicly notify the intention to prepare or review an NPMP (Option 1).

32. EDS supports Option 1 in principle. However, we caution that overseas studies highlight the importance of early engagement and consultation in achieving robust and effective conservation planning and plan outcomes. Removal of this step will make early engagement with tangata whenua and other stakeholders even more essential.

Issue 1C(ii): Public notification and public input requirements on notified draft planning documents are outdated and overly prescriptive

33. Under the existing law a draft planning document is publicly notified, submissions are called for, and hearings are held on those submissions. The law is very prescriptive in terms of how public input is sought.

34. The Discussion Document describes how DOC would like more flexibility in how it can undertake public engagement, with the desired outcome being to improve public participation when developing planning documents. It proposes two ways of doing this:

    a. Amend existing legislation to remove the requirement to hold hearings (Option 1); or

    b. Amend existing legislation by retaining a modified hearings process (Option 2).

35. EDS is encouraged by DOC's consideration of alternative forms of public engagement. Formal hearings can be intimidating processes and exclude members of the public from fully engaging with plan development. Having said that, hearings are an important opportunity for decision-makers to test issues and solutions with interested parties in a structured way.

36. While EDS fully supports DOC's desire to engage with the public in more innovative and creative ways, it wishes to retain the ability to appear before DOC and the NZCA at a public hearing. That is not to say that a hearing would be required in every case, but EDS

submits that retaining the ability to hold a hearing is beneficial (e.g., where there are particularly complex issues).

37. EDS supports any proposal to modernise public notification requirements via electronic means.

38. Accordingly, EDS supports a modernised requirement for public notification and seeking public input on draft plans, while retaining a modified hearings process (Option 2).

Issue 1C(iii): Requirements for publishing draft or approved planning documents do not reflect modern preferences for accessing information

39. EDS supports any proposal to modernise public notification requirements via electronic means. Accordingly, EDS supports Option 1.

Chapter 2: Concessions

Issue 2A: All activities require individual concessions, even when activities are commonplace and have no or minimal adverse effects that can be appropriately managed

40. The granting of concessions is currently reactive, with applications made to DOC for assessment and approval on a case-by-case basis. There is no ability for DOC to pre-approve applications that are commonplace, or which have minimal impact.

41. The Discussion Document details the backlog of applications that occurs because of this approach, and the excessive resources required to resolve each application.

42. To address this issue it is proposed that the Minister of Conservation be provided with an ability to generally authorise specific activities, removing the need for a concession (Option 1).

43. Broadly speaking, EDS would support an approach that enables the Minister to issue regulations authorising defined commonplace or low impact activities if the purposes and priorities of the Conservation Act and associated general policy were clear. However, unfortunately, that is not the case. Until these matters are addressed in substantive reform of the conservation system, general authorisation of activities is premature. This is particularly important when considering tangata whenua values, as their concerns may relate to the nature of the activity, not necessarily its scale.

44. Accordingly, EDS does not support removing the need for concessions and providing for general authorisation of specific activities (Option 1). Rather, it supports retention of the status quo (Option 2).

45. If Option 1 was pursued the following matters would need to be addressed:

    a. Scope of the Minister's power - the Discussion Document lists several proposed criteria for authorising activities through regulations. EDS supports the suggested criteria, but submits that they should be strengthened to enable more effective conservation management. Specifically:

        - *Requirement that environmental impacts can be effectively managed* - 'unacceptable adverse effects' is not an appropriate statutory threshold for activities subject to general approval. EDS submits that a 'low or no effects on conservation values' threshold should be applied. This recognises that conservation objectives must be prioritised over other activities.

- *Nature of the activity is not contrary to the purposes for which the land is held* - as noted above, the current statutory framework lacks clear purposes which undermine the strength of this criteria. That aside, EDS submits that regulations should specify the status of the land to which general authorisations apply, thus removing any doubt about whether activities are consistent with the purposes for which the land is held. This is particularly important in the context of the stewardship land reclassification process, where conservation land will be assigned new purposes.

b. Terms and conditions of the general authorisation – these will have to be clearly articulated in the authorisation to ensure that permitted activities are well defined.

c. Review of regulations – once a regulation has been issued, it is unclear how activities will be monitored, enforced or reviewed. Regulations may need to be amended or retracted in the event of unforeseen effects. A trigger for this process should be provided for in the legislation.

d. Collection of royalties, fees, rents – there is a need to ensure that commensurate revenue is collected from commercial activities obtaining benefits from the use of public conservation resources. EDS accepts that for some general authorisations of specific activities section 17X of the Conservation Act should appropriately apply to waive the collection requirement (i.e., when the activity contributes to the management of the land). However, that may not always be the case and DOC should retain the ability to collect revenue from some general authorisations.

Issue 2B: DOC cannot make a concession for pre-approved activities available on demand

46. The Conservation Act does not currently allow DOC to pre-approve an activity by considering the activity in advance of, or without, an application being received. It is proposed that DOC be provided with this ability (Option 1).

47. EDS does not support Option 1 for the same reasons that we do not support Option 1 of Issue 2A above. While EDS agrees that a pre-approval mechanism could help streamline concession processes, and provide a mechanism for more strategic decision-making, this approach is premature given that conservation purposes are still subject to substantive reform.

48. Further, the Discussion Document lacks important detail around the approval process and criteria for pre-approval. The anticipated discretion also appears to be very broad "*the range of concessions that would be available for pre-approval would be at DOC's discretion, following appropriate consultation with iwi, hapū and whanau*."

49. If Option 1 was pursued, the matters set out in paragraph 45 would also need to be addressed for any pre-approvals.

Issue 2C: Unclear whether a concession application could be returned if tendering the opportunity would be more appropriate

50. Under existing legislation DOC can use tendering when allocating concession opportunities. Once a tender process has been initiated, any concessions applied for in relation to that activity must be returned, with the applicant being encouraged to submit to the tender. However, it is unclear if DOC is able to return a concession application that has been received before a tender process is initiated. This has led to a first-come-first served approach which has led to fairness concerns and issues with appropriately pricing opportunities.

51. EDS supports tendering processes which can result in improved conservation outcomes and efficiencies, and more strategic decision-making. We agree that it is appropriate for DOC to return concession applications in circumstances where multiple parties have informally expressed an interest in the opportunity and when it wishes to consider other potential uses of the opportunity.

52. EDS submits that the additional requirement to initiate a tender process within a set timeframe is a useful addition. The Discussion Document invites thoughts on the appropriate timeframe, and EDS submits that three months would be appropriate.

53. Accordingly, EDS supports amendment to the Conservation Act to provide the Minister of Conservation with the ability to return a concession application if initiating a tender process would be more appropriate, and that the process must be initiated within three months (Option 2).

Issue 2D: The tender process does not allow a successful tender candidate to be offered a concession outright

54. Currently, a preferred tender applicant is not automatically granted a concession based on its tender proposal. Rather, after being identified as the preferred tender applicant, a subsequent concession application is required. This process is duplicating DOC work. It is proposed that a successful tender applicant be granted a concession directly upon winning the tender, but only if the statutory provisions of Part 3B of the Conservation Act are met. Part 3B sets out the assessment requirements for concessions (Option 1).

55. The Discussion Document notes that the proposed reform would only apply in circumstances where the activity had been fully assessed and authorised before the tender process was initiated, and that the activity would have to match what was described in the tender. EDS agrees that Option 1 should not be applied in cases where the tendered opportunity is unclearly defined. Amendments would need to clearly define the application of Option 1.

56. Ensuring that the activity has been assessed against Part 3B is also critical. EDS would not support a process that enabled successful tenders to proceed without having first been assessed under Part 3B.

57. EDS supports Option 1, subject to the automatic concession process being applied in limited circumstances where the tender is clearly defined and where the activity has been assessed against Part 3B.

Issue 2E: No statutory timeframe for when requests for reconsideration of a decision may be sought

58. Currently, an applicant can seek a reconsideration of a decision made on their concession application, but no statutory timeframe is provided within which a request must be made. The proposed reform seeks to provide a statutory timeframe of 15 working days (option 1).

59. EDS supports Option 1, 15 working days is in line with appeal periods on resource consent applications under the RMA.

60. For balance, EDS recommends that submitters be provided with a similar right to request reconsideration of decisions. This would assist to trigger a review of potentially problematic applications.

Chapter 3: Minor and technical amendments

61. EDS has no issue with the minor amendments outlined in Chapter 3 of the Discussion Document.

Conclusion

62. Overall, EDS considers that there is merit in many of the options put forward in the Discussion Document. For example, we agree that a statutory check-in mechanism could enable a more tailored and considered approach to plan review. Improvements to facilitate greater use of tendering processes and the adoption of a more flexible modified hearings process could also add significant value. As could the measures outlined to streamline no or low impact concessions. However, the Discussion Document lacks important detail around how the proposed changes would operate in practice and the criteria that would be employed. It is essential that clear statutory direction is provided, given the lack of clear statutory purposes in our current legislation. For these reasons we are unable to support many of the proposals outlined, in their current form.